Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

THE NATIONALIST MOVEMENT,
Petitioner

vs.

CITY OF CUMMING, GEORGIA,
Respondent

Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court exercise its independent appellate review, to independently examine the record as a whole, in this First Amendment challenge?

2. Is an Ordinance invalid on its face, or as applied, under the First Amendment, which purports to ban parades which petition the government for redress of grievances, on the public streets, in and about the seat of government, by vesting unfettered discretion in the Ordinance's Administrator to classify "private" persons and "private" purposes, which may be restricted to limited hours, but exempting other persons and purposes, including a commercial parade where vendors hawk their wares, who are not restricted, based upon the content of the paraders' speech?

3. Is such Ordinance, which prohibits "private" parades approximately 65% of the time, on all streets leading to, or adjacent to, the seat of government, void for vagueness, overly broad or a denial of equal protection, under the First and Fourteenth Amendments?

4. Should the Court oversee the conflict between the Fifth Circuit, which has struck down bans on evening parades and classifications distinguishing between governmental and private parades, as violative of the First Amendment, and the Eleventh Circuit which specifically disavows such a rule?

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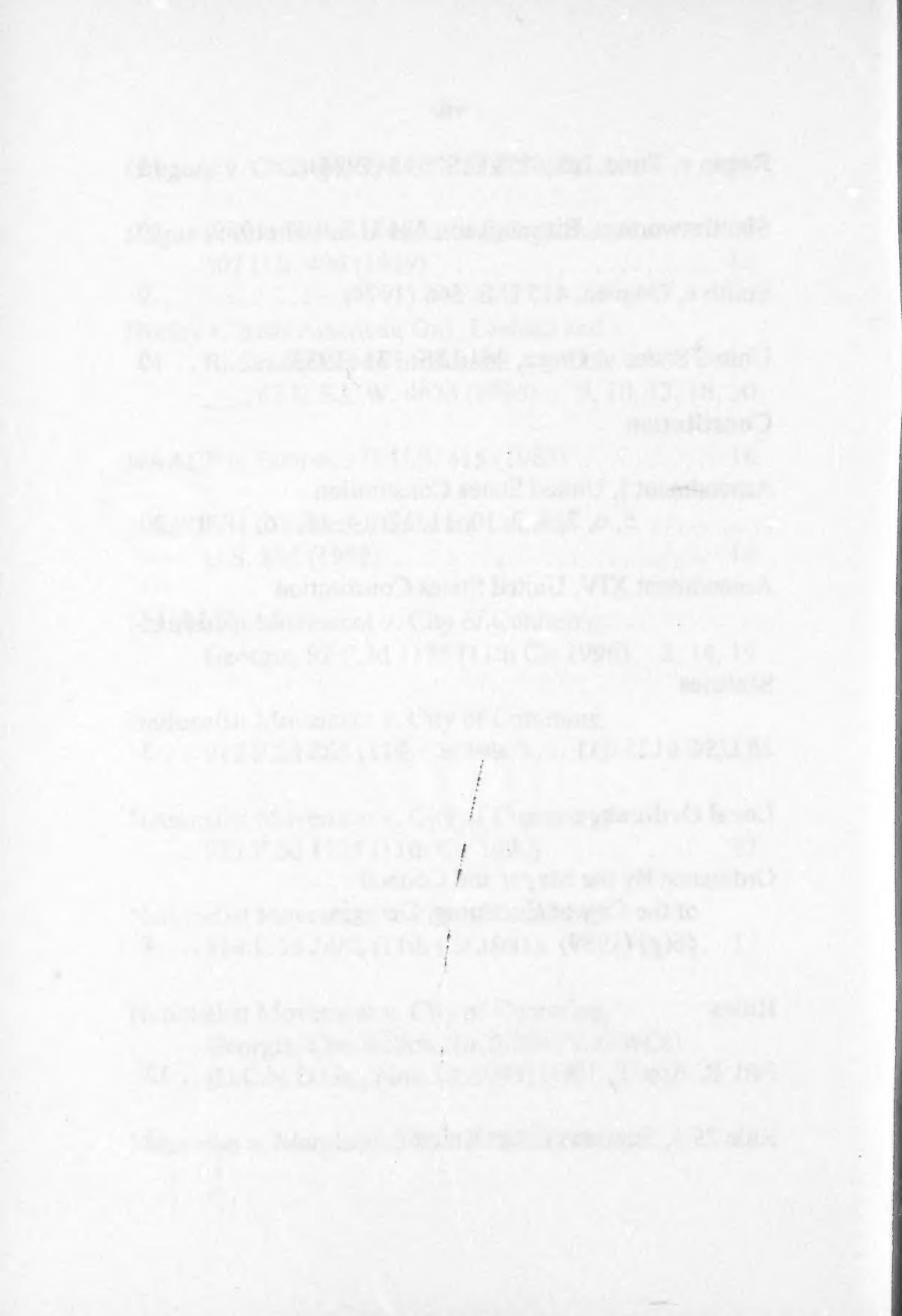
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Nationalist Movement, by and through counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this matter.



OPINIONS BELOW

The ruling of the United States Court of Appeals for the Eleventh Circuit from which certiorari is sought is contained in the case styled *The Nationalist Movement v. City of Cumming, Georgia, Forsyth County, Georgia and Forsyth County Board of Education,* 92 F.3d 1135 (11th Cir.1996), at Appendix A, dated August 28, 1996, which upheld the constitutionality of the City of Cumming Ordinance which bans parades at the seat of government. The final judgment is at Appendix B, dated August 28, 1996. The decision of the United States District Court for the Northern District of Georgia, Gainesville Division, in the case styled *Nationalist Movement v. City of Cumming, Georgia,* Civ. Action No. 2:89-CV-6-WCO (D.C.N.D.Ga., June 30, 1995), at Appendix C, dated June 29, 1995, was affirmed. The final judgment is at Appendix D, dated June 30, 1995.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.1, Petitioner states that it is a Mississippi non-profit corporation, having no parent corporation. All subsidiaries are wholly part of Petitioner.

CONSTITUTIONAL PROVISIONS

Amendment I, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

> and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



LOCAL ORDINANCE

Ordinance By the Mayor and Council of the City of Cumming, Georgia, §6(g) (1989):

> [N]o private organization or group of private persons may use the roads immediately adjacent to those roads which lead directly to the Forsyth County Courthouse grounds for private purposes of holding a parade, assembly, demonstration, or other similar activity on any non-holiday weekday prior to 8:00 am or after 5:00 pm or on any Saturday, Sunday, or public holiday prior to 1:00 pm or after 5:00 pm. These prohibitions are not in any way intended to restrict the scheduling of the annual 4th of July Thomas-Mashburn Steam Engine Parade which, according to tradition, occurs during the morning hours in conjunction with the 4th of July celebration.

STATEMENT OF THE CASE

Petitioner, a non-profit charitable and educational corporation, has been faced with a history of oppressive and arbitrary conduct at the hands of government officials in Forsyth County, Georgia. It was banned by the City of Cumming, Georgia and Forsyth County, Georgia, from conducting any kind of parade or assembly of the people anywhere on public property or on the public streets in 1987. Petitioner challenged this "Moratorium" in the district court in 1987 on the grounds that it violated the First Amendment.[1]

In Januray, 1988, Petitioner conducted a parade in Cumming, Georgia, on a Saturday, assembling at the high school parking lot and marching, beginning at Noon (during hours prohibited by Respondent's Ordinance, but unimpeded by Respondent), a distance of about a mile, using the full width of a city side street, to the Forsyth County Courthouse, where a rally was held, speeches given and petitions taken up to protest the Martin Luther King Holiday. The rally assembled in the street, in front of the courthouse, rather than on County premises, because marchers were protesting Forsyth County's attempt to charge a parade fee.[2] About a hundred-fifty people took part; the procession crossed a state highway, taking a few minutes to do so.

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[1] *Forsyth County Defense League v. City of Cumming, Georgia*, Civil Action No. 87-031(G), (D.C.N.D.Ga.1987)

[2] The fee was ruled to be facially invalid under the First Amendment in *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123 (1992).

The entire parade took about fifteen minutes. There were no traffic jams or disruptions and the proceedings took place without incident or violence.

In 1989, Petitioner scheduled an identical event, but beginning a few hours earlier in order to assemble and instruct marchers caravaning to a similar parade later in the day in Atlanta and to address the theme of the event to the news media.

The City of Cumming refused a permit under an Ordinance which prohibited parades on weekdays after 5:00 PM and before 8:00 AM and on weekends and holidays before 1:00 PM and after 5:00 PM on roads adjacent to and leading to the seat of government. The Ordinance also classified citizens as "public," who could parade at any time, and "private," who could not. Respondent classified Petitioner as "private." The Ordinance also classified events as being for "public" purposes, which could be held at any time, and as being for "private" purposes, which could not. A Steam Engine Parade, held during the morning hours in which merchants sold their wares, was exempted from the prohibitions. The City also restricted use of the roadway to one-lane, but saying that it would allow the parade in the afternoon. Because organizers and marchers were parading that same afternoon in distant Atlanta, the parade in Cumming was canceled.

Petitioner sued in the district court to invalidate the City of Cumming's parade Ordinance, as violative of the First and Fourteenth Amendments, and to strike down limits on use of the full-width of the roadway. Injunctive relief was, also, requested. Forsyth County, Georgia's ordi-

nance charging fees for parades was challenged, as were new restrictions by the Forsyth County Board of Education on use of the school parking lot.

The District Court dismissed the case. On appeal, the Eleventh Circuit upheld dismissal of the Forsyth County Board of Education, on the grounds that a basketball game preempted use of the parking lot. The district court was reversed on the grounds that Forsyth County's charge for parades violated the First Amendment. The Eleventh Circuit remanded the case to give the City further opportunity to present evidence on the reasonableness of its Ordinance, whether the measure was narrowly tailored and on the restriction on use of the full width of the roadways. Meanwhile, this Court ruled that Forsyth County's fee for parades was facially invalid as violative of the First Amendment; it also clarified and extended the doctrines of facial invalidity and content-neutrality.

In August, 1992, Petitioner rallied at the Forsyth County Courthouse, including assembly of the people in the streets adjacent to the courthouse, during hours prohibited by the Ordinance, but unimpeded by Respondent.

Petitioner entered a nonsuit on use of the full-width of the roadway and the case was submitted on affidavits. The district court considered the Ordinance with a 1989 amendment which added the exemption for the Steam Engine parade. Petitioner objected to inclusion of hearsay in Respondent's affidavits. The Court ruled that the Ordinance was constitutional, limiting the case to the narrow issue of whether a Saturday morning ban was constitutional. The court declined to consider conduct of Respon-

dent under its Ordinance, broad restrictions on the face of the Ordinance or exemptions granted to "public" persons, commercial Steam Engineers and "public" purposes.

On appeal, the Eleventh Circuit held, *inter alia,* that overbreadth, void-for-vagueness, equal protection and other claims were waived, that the district court properly limited the scope of its examination, that the record as a whole need not be examined, that the Ordinance was not included in the record below and therefore the previous Ordinance would be considered and that the "law of the case" applied to prohibit examining the issue of content-neutrality. Holding that the Ordinance was a reasonable restriction on the First Amendment, the Eleventh Circuit upheld the measure. The case is timely brought here.

REASONS FOR GRANTING THE PETITION

PROPOSITION I

CONSTITUTIONAL GUARANTEES OF FREE SPEECH ARE VIOLATED BY AN ORDINANCE WHICH GRANTS UNFETTERED AUTHORITY TO AN ADMINISTRATOR TO SCHEDULE THE TIME FOR AN EXPRESSIVE PARADE, AT THE SEAT OF GOVERNMENT, IN THE TRADITIONAL PUBLIC FORUM, BASED UPON THE STATUS OF THE PARADERS OR THE CONTENT OF THEIR SPEECH.

This Court has only recently elaborated on and defined

modern constitutional law on the use of public forums for expressive activities, but its guidance has been deliberative and dispositive. The principles of *Forsyth County, Georgia v. The Nationalist Movement,* 505 U.S. 123 (1992) are persuasive and controlling.

Petitioner seeks to conduct a peaceful protest against the Martin Luther King Holiday. See *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Group of Boston*, 63 U.S.L.W. 4625, 46-28-4629 (1995) (for the rationale that essentially all parades carry some sort of message). Here, an Ordinance purports to set up categories of "private" and "public" persons, as well as "public" and "private" discourse," but with no guidelines to guide the administrator of such a law. The administrator necessarily must take into account the content of the speech of would-be paraders, see *Forsyth County*, 505 U.S. at 134 (for the "necessity" rationale) in deciding if they are "public," in which case they can parade at any time, or "private" in which they can parade only in the afternoons during carefully prescribed hours. The ruling below that constitutional guarantees are satisfied because a parade can be held at some time, set by government officials, albeit not at the time selected by the paraders, sets up a "back of the bus" for paraders "unpopular" to officials. Such an ability to stigmatize American citizens, seeking to petition the government, violates the First Amendment. *See e.g. Smith v. Goguen*, 415 U.S. 566 (1974) (for the potentiality for abuse when an Ordinance can be administered in an arbitrary manner).

PROPOSITION II

THE ORDINANCE WHICH PROHIBITS EXERCISE OF THE FIRST AMENDMENT AT OR ABOUT THE SEAT OF GOVERNMENT SOME SIXTY-FIVE PERCENT OF THE TIME, ON ITS FACE OR AS APPLIED, VIOLATES THE FIRST AMENDMENT.

Petitioner seeks to exercise the most basic constitutional rights in their most pristine and classic form, *Edwards v. South Carolina,* 372 U.S. 229, 235 (1963), *accord, Shuttlesworth v. Birmingham,* 394 U.S. 147, 152 (1969). The courthouse and roads leading thereto constitute the traditional public forum, *United States v. Grace*, 461 U.S. 171, 177 (1983), even the "archetype" place for public speech, *Frisby v. Schultz*, 487 U.S. 474, 480 (1986).

That Petitioner wishes to assemble and address its grievances against the King Holiday early in the morning, rather than later on, and to give instructions to marchers about later events, is an immediacy of speech which cannot be shunted aside, *see Elrod v. Burns,* 427 U.S. 347, 373 (1976), *Dombrowski v. Pfister,* 380 U.S. 479 (1965) (for the immediacy rationale), absent some compelling governmental reason, none of which is shown in this case.[3]

While the Ordinance is objectionable as a prohibition

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[3] News coverage of speech earlier in the day would likely receive more circulation than that of an event later in the day, promoting more public discussion of the issues sought to be addressed. Obtaining news coverage is a recognized objective of a parade, *Hurley*, 63 U.S.L.W. at 4628.

on the Saturday-morning time-frame within which Petitioner sought to parade, the Court recognizes that one challenging an overly broad Ordinance stands to represent those who may wish to parade at other times, also banned by Respondent, such as on a Saturday morning before 8:00 AM, or after 5:00 PM or on holidays, as the case may be.

> This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.

Forsyth County, 505 U.S. at 129.

PROPOSITION III

THE COURT HAS A CONSTITUTIONAL DUTY TO CONDUCT AN INDEPENDENT APPELLATE REVIEW OF THIS FIRST AMENDMENT CASE AS A RULE OF FEDERAL CONSTITUTIONAL LAW.

The Court has stated that it is its constitutional duty to examine the whole record[4] in First Amendment cases.

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[4] In holding that "content neutrality" of the Ordinance was not an issue, the lower Court relied upon a phrase in the prior appeal that the claim that the Ordinance was content-based "is refuted by the simple fact that the City granted the Movement's earlier request to conduct a parade in the afternoon," *The Nationalist Movement v. City of Cumming*, 913 F.2d 885, 888 (11th Cir.1990), although not the mornings before 8:00 AM, after 5:00 PM in the afternoon or at certain other times.

> Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). The "requirement of independent appellate review ... is a rule of federal constitutional law" ....

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 63 U.S.L.W. 4625, 4628 (1995).

Moreover, the challenged Ordinance was duly part of the record, cited in the judgment of the trial court.[5]

The ruling should not affect the outcome of this case because: 1) The phraseology was not part of the *ratio decidendi* of the case. The ruling remanded the case for further evidence on the City's reason for barring the parade. 2) The remand order, itself, provided that whether the Ordinance was "narrow-tailored" was at issue, *Nationalist Movement v. City of Cumming*, 913 F.2d 885, 888 (11th Cir.1990), *vacated*, 921 F.2d 1125 (11th Cir.1990), *original opinion reinstated*, 934 F.2d 1482 (11th Cir.1991), *aff'd on different issue*, 505 U.S. 123 (1992). 3) This Court had not yet ruled in *Forsyth County, Georgia v. The Nationalist Movement* and the law may have been unclear on "content-neutrality" prior to that ruling. The latest rulings should control. See *Forsyth County*, 505 U.S. at 136 (constitutional examination must proceed in light of the Court's current First Amendment jurisprudence). 4) This Court conducts its own independent appellate review, *Hurley*, 63 U.S.L.W. at 4628.

[5] The papers filed in the district court are part of the record on appeal. *Fed. R. App. P.* 10(a). The challenged Ordinance was cited by the district court and included in the Court's final order. The case was tried on the Ordinance. While the only difference between the 1987 and 1989 Ordinance is

PROPOSITION IV

A FACIAL CHALLENGE TAKES INTO ACCOUNT THE CONDUCT OF THE ADMINISTRATOR OF THE ORDINANCE, ANY UNFETTERED OR ARBITRARY DISCRETION OF THE ADMINISTRATOR, THE IMPACT OF THE ORDINANCE ON FUTURE CONDUCT AND CONDUCT BY OTHERS AND THE RECORD AS A WHOLE.

There at least three significant instances[6] of Respondent violating its own Ordinance, which conduct went unheeded, below. The January, 1988 parade was held beginning at Noon, rather than at 1:00 PM, within the hours proscribed by the law. The Fourth of July Parade was held during the prohibited time-frame. A rally in the streets during the proscribed times was held in August, 1992.[7] Nor was the language of the Ordinance showing that Respondent intended to ban parades some 65% of the time.[8]

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that the latter grants an exemption to a commercial Steam Engine parade, the difference shows arbitrary conduct of the City in enforcing its Ordinance. The testimony in the case heavily dealt with the Steam Engine Parade, was argued and briefed below and the issue of the unconstitutionality of the exemption and arbitrary conduct is properly before the Court.

[6] See *e.g.* R3-Carver Affidavit 22-25.

[7] R3-Carver Affidavit-28 and Ex. "J".

[8] Respondent had enacted a "moratorium" against Petitioner parading or assembling on any public street or in any public place in 1987. Petitioner challenged that ban in *Forsyth County Defense League v. City of Cumming, Georgia,* Civil Action No. 87-031(G), (D.C.N.D.Ga.1987).

> In evaluating petitioner's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it.

Forsyth County, 505 US. at 131.

PROPOSITION V

OVERBREADTH, VOID-FOR-VAGUENESS, EQUAL PROTECTION AND OTHER OBJECTIONS ARE PROPERLY PART OF THIS FIRST AMENDMENT CHALLENGE.

The lower court held, in error, that since Petitioner had argued that the Ordinance was facially invalid, any overbreadth, vagueness and equal protection arguments could not be considered, *Nationalist Movement*, 92 F.3d 1135, 1138-1139 (1996). This is contrary to long-standing precedent. *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) (time, place and manner restrictions may not delegate standardless discretionary power to local functionaries).

> Respondent mounts a facial challenge to the ... ordinance. It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation.

Forsyth County, 505 U.S. at 129.

The Complaint seeks

> a declaratory judgment that Section 6(g) of the City's said Ordinance, on its face or as applied, banning Saturday morning assemblies or parades (or the same across the board at other times), is violative of the First and Fourteenth Amendments to the United States Constitution [¶4, 14].

On this theory, the case was pleaded, argued, tried and appealed. Both on its face and as applied, the Ordinance is so vague as to who is "private" and "public" that it fails to give adequate, constitutional notice as to who may and may not parade; it also abridges equal protection. The blanket prohibition of parades on all streets leading to the seat of government at any given time (or at the time sought by Petitioner, as the case may be) is overly broad. The restriction of streets "leading directly to" the courthouse, apart from those which do not, is bizarre and capricious.

The permitting of the commercialized[9] Steam Engine Parade,[10] where vendors hawk their goods, while banning those exercising their free speech rights during the same time-frame is intolerable under the First Amendment (as well as the Fourteenth Amendment, as the case may be), see *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984) (regulations permitting government discrimination on the basis of content of message cannot be tolerated under the

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[9] *E.g.* R3-Carver Affidavit 22-25.

[10] The proper exercise of governmental authority is simply to assure the first-come, first-served priority of differing events seeking to parade at the same time, *Cox v. New Hampshire*, 312 U.S. 569, 574-576 (1941).

First Amendment). The on-again-off-again proscriptions meted out against Petitioner, sometimes waiving the Ordinance and sometimes attempting to enforce it, are unconstitutionally arbitrary. *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("precision of regulation" required for constitutionally protected activity).[11]

PROPOSITION VI

THE WEIGHT OF THE EVIDENCE SHOWS THAT THERE ARE NO COMPELLING, SUBSTANTIAL OR REASONABLE GROUNDS TO ABRIDGE THE FIRST AMENDMENT.

The Court below postulates that regulation of traffic can be asserted, without very much more, to ban a parade. The record discloses a parade taking approximately fifteen minutes,[12] of some hundred-fifty people, along a back[13] street, and crossing a state highway for a matter of minutes,

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[11] *See also Forsyth County*, 505 U.S. at 132. The test is that arbitrary application of a government regulation is

> *inherently* inconsistent with a valid time, place and manner regulation because such discretion has the *potential* for becoming a means of suppressing a particular point of view [emphasis added].

Even on the "time place and manner" analysis adopted below, the Ordinance still fails the test.

[12] R3-Carver Affidavit-24.

[13] Testimony was uncontradicted that the road was the "least traveled" in the area, R3-Carver Affidavit-6, 7-8, 10-12.

in the exact duplication of a march held, uneventfully, the previous year, some two hours later in the day.

There is no evidence of any traffic being blockaded, streets jammed, shoppers kept at bay, businesses shut down, pedestrians accosted or people being unable to get to and fro, whatsoever. Over objection, the trial court allowed hearsay in an affidavit that "several complaints" from unknown persons had been received about "traffic disruptions" although the evidence showed approximately a eight roads leading to and from the Forsyth County Courthouse, open and usable, to traffic.[14] Even with the hearsay, there is insufficient showing that traffic was, or would have been, impeded, in any significant manner, to justify the broad and unreasonable restriction of parading on a street leading to the seat of government. In addition, the City attempted to channel the parade through a single lane of traffic, unlike the previous parade which used the full width, ostensibly for better traffic flow. Note that this Court found that Forsyth County is, in any event, a "primarily rural county", *Forsyth County*, 505 U.S. at 124.

There was not even the barest showing of why parades are banned in the late afternoon, early mornings or evenings. Respondent has not overcome the "heavy burden" and "heavy presumption" against it[15] to impose a prior re-

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[14] R3-Carver Affidavit-Ex. "A", "B" and "B(2)" on the point is undisputed. One can exit the courthouse by at least four different roadways.

[15] The record as a whole also does not support the contention that the issue was limited beyond the framework of the Complaint, remand and non-suit of the issue of use of the full-width of the roadway.

straint on speech, see *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (for the rationale).

While the Court below is correct that "safety" and "convenience" are valid governmental objectives, the record is bare about any lack of safety or convenience, occasioned by the proposed parade, or why all of the many roads leading to, from and about the courthouse must be off-limits to citizens exercising the First Amendment, see *Hague v. Committee of Industrial Organizations,* 307 U.S. 496, 515 (1939) (condemning state interference in free speech activities). See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912-913 (1982) (states have broad power to regulate economic activity, but not a comparable right to prohibit peaceful political activity).

Petitioner has shown that its parade is "peaceful" and "orderly," the two requisite prongs set forth in *Gregory v. Chicago,* 394 U.S. 111, 112 (1969), in order to fall within the sphere of conduct protected by the First Amendment.[16]

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[16] As to the contention below that there was "increased traffic" in the morning, Petitioner may well have sought to parade when there would be more bystanders, as would be its right. The Court recognizes the importance of bystanders to those exercising the First Amendment, *Hurley*, 63 U.S.L.W at 4628, as well as presumably to those witnessing the parade, reading placards carried and pondering the message of the marchers. The implication that the general public somehow abhors the parade and is likely to be inconvenienced or offended by it is beyond the decision-making powers of Respondent.

PROPOSITION VII

A SPLIT BETWEEN THE FIFTH CIRCUIT, WHICH DISALLOWS BANS ON EVENING PARADES AND EXEMPTIONS FOR GOVERNMENT PARADES AS A VIOLATION OF THE FIRST AMENDMENT, AND THE ELEVENTH CIRCUIT, WHICH DISAVOWS SUCH RATIONALE, NEEDS TO BE RESOLVED.

The Fifth Circuit has invalidated a ban on evening parades, which is identical to the ban sought to be imposed by Respondent, as overbroad, see *Beckerman v. City of Tupelo,* 664 F.2d 502, 513 (5th Cir. Unit A 1981). The Tupelo Ordinance also purported to exclude school groups and government agencies from the ban, identically to the "public" and "private" distinctions of the challenged Ordinance, here. The Eleventh Circuit ruled that the Fifth Circuit rule "is not binding in this circuit," *Nationalist Movement,* 92 F.3d at 1140, n. 7. Such a holding is a patent violation of the First Amendment.[17]

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[17] See *e.g. Forsyth County*, 505 U.S. at 129 for the accepting of a case to resolve conflicts between Circuits.

CONCLUSION

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley, 63 U.S.L.W. at 4632.

This is an important case, with broad implications for freedom of speech in this country. Unless checked, government officials would be tempted to broaden their First Amendment curfews until all that could be left would be virtually some "red light" districts or "blue hours" for open discourse, if that. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

RICHARD BARRETT
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THE NATIONALIST MOVEMENT, a Mississippi non-profit corporation incorporated in Georgia,

Plaintiff-Appellant,

v.

CITY OF CUMMING, GEORGIA,

Defendant-Appellee

Forsyth County, Georgia, Forsyth County Board of Education, Defendants

Aug. 28, 1996

Appeal from the United States District Court for the Northern District of Georgia

Before KRAVITCH and BIRCH, Circuit Judges, and SCHWARZER,* Senior District Judge.

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* Honorable William W. Schwarzer, Senior U.S. District Judge for the Northern District of California, sitting by designation.

Appendix 2

KRAVITCH, Circuit Judge:

The issue in this case is whether the City of Cumming's ordinance banning parades on Saturday mornings is a reasonable time, place, and manner restriction on speech. The Nationalist Movement brought suit under the First Amendment after the City invoked the ordinance to deny permission for the Movement to hold a Saturday morning parade. A prior panel of this court determined that the ordinance was content-neutral but remanded the case to the district court for further evidentiary proceedings. The court held that remand was necessary because the City had not been given an opportunity to show "that its ordinance furthers significant municipal interests, that it is narrowly tailored to achieve those interests and that those wishing to engage in expressive activity in Cumming have ample alternative means of doing so." *Nationalist Movement v. City of Cumming*, 913 F.2d 885, 888 (llth Cir.1990), *vacated,* 921 F.2d 1125 (llth Cir. 1990), *original opinion reinstated*, 934 F.2d 1482 (llth Cir.1991), *affd on different issue,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

Upon remand, the parties agreed to submit all evidence in the form of affidavits. The district court reviewed the affidavits and concluded that the ordinance was a reasonable time, place, and manner restriction on speech and thus did not violate the First Amendment. We agree.

I.

The Nationalist Movement sought to conduct a parade and rally in Cumming, Georgia. The purpose of the parade

was to protest the federal holiday commemorating Dr. Martin Luther King, Jr. In furtherance of this plan, the Movement applied for permits with three distinct entities: the City of Cumming, Forsyth County, and the Forsyth County Board of Education. Although the Nationalist Movement originally brought suit against all three public bodies, only its case against the City of Cumming is before us on appeal.[1]

The Movement filed a permit request with the City administrator for a parade to begin at the high school grounds and to proceed down Tribble Gap Road to the courthouse. The parade was scheduled to commence at 1:00 p.m. on Saturday, January 21, 1989. The City Commission granted the permit but limited the parade participants to one-lane of Tribble Gap Road. The Movement subsequently sought to change the time of its event in Cumming to Saturday morning to accommodate an afternoon rally it intended to hold in Atlanta. According to the Movement, it planned to inform parade participants in Cumming of the Atlanta rally and urge them to travel to Atlanta as part of a caravan.

The City denied the request for a change in the parade time pursuant to the City Parade and Assembly Ordinance. The Ordinance provided, in relevant part:

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[1] The Movement's claim against the County was resolved by the Supreme Court in *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (holding that the County's permit fee violated the First Amendment). This court previously ruled against the Movement in favor of the Board of Education. *Nationalist Movement*, 913 F.2d at 892.

> [N]o private organization or group of private persons may use the roads immediately adjacent to and those roads which lead directly to the Forsyth County Courthouse grounds for private purposes of holding a parade, assembly, demonstration, or other similar activity on any non-holiday weekday prior to 8:00 am or after 5:00 pm or any Saturday, Sunday, or public holidays prior to 1:00 pm or after 5:00 pm.

City Amended Parade and Assembly Ordinance, § 6(g).[2] The ordinance contains a lengthy preamble explaining the City's findings and purposes in enacting these restrictions, including preserving public safety, ensuring the orderly flow of traffic, restricting interference with the administration of justice at the courthouse, and protecting the rights of citizens residing in close proximity to the courthouse.[3]

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[2] The ordinance quoted here is dated October 1, 1987. According to the parties, the Ordinance was subsequently amended in 1989. The 1989 ordinance is not included in the record on appeal to this court. Moreover, appellant specifically represented to the court that "[t]he amendment did not appear to materially change anything pertinent to the matter at hand...." Appellant's br. at 2. Accordingly, we rely upon the 1987 ordinance.

In this appeal, for the first time, appellant argues that the ordinance is unconstitutional because it exempts the annual Fourth of July parade. This provision is not part of the 1987 ordinance. We assume that the exemption was enacted by the later amendment. Because appellant did not raise this issue before this court in its prior appeal and because it has specifically disclaimed any reliance on the 1989 amendment, we decline to address this argument.

[3] The preamble is set forth in this court's earlier opinion, *Nationalist Movement*, 913 F.2d at 889 n. 3.

After this court remanded the case, the City provided evidence in support of its ordinance. The city manager, a business manager, a drugstore owner, a banker, and a physician signed affidavits attesting that the Saturday morning ban was beneficial to residents who conduct business in the courthouse square on Saturday mornings. These affiants uniformly observed more traffic on Saturday mornings than Saturday afternoons.

The City Manager, Gerald Blackburn, stated that the following businesses are located directly on the square: a drug store, doctors' offices, a retail outlet, an antique shop, a furniture store, a barber shop, a beauty salon, real estate agents' offices, and two banks. He further noted that all of these businesses, as well as several stores within a few blocks of the square, are open on Saturday mornings. Moreover, Blackburn stated that he personally has received several complaints from proprietors of these businesses concerning the disruption in traffic when parades or rallies are held on Saturday mornings. He noted that traffic in Cumming is particularly heavy on Saturday mornings because local residents are coming downtown to conduct business while others are passing through Cumming on their way to Atlanta or the North Georgia Mountains.

Jimmy Goodson, owner of a drugstore on the courthouse square, and Dr. Shannon Mize, whose office is located on the square, submitted affidavits stating that they were personally aware of many patients who were only able to schedule doctors' appointments or fill prescriptions during Saturday mornings. Both of these affiants were personally aware of the traffic disruption that occurs when parades and rallies are scheduled for Saturday mornings.

In response, the Movement submitted an affidavit from Daniel Carver, a resident of Oakwood, Georgia, who has attended events in Cumming on Saturday mornings. This affiant described Cumming as lacking any urban congestion and stated that there is no difference between the traffic on Saturday mornings and Saturday afternoons. The district court relied heavily on the City's affidavits in holding that the ordinance was constitutional.

II.

The only issue before this court is whether the City's ban on Saturday morning parades is a reasonable time, place and manner restriction on speech.[4] Although the Nationalist Movement seeks to introduce other issues, it is precluded from doing so for two reasons. First, in its prior appeal to this court, the Movement argued only that the ordinance was a blanket prohibition on speech rather than a reasonable time, place and manner restriction and that the City had not proven its interest in controlling traffic. The Movement did not raise the issues of overbreadth, vagueness and equal protection that it seeks to introduce here; thus, the Movement waived these claims by failing to raise them in the prior appeal.

Second, the Movement's attorney agreed to narrow the issue to the Saturday morning ban during a pretrial conference with the district court as reflected by a pretrial

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[4] This court originally remanded to allow the City to present evidence with respect to two issues: the Saturday morning ban and the restriction to one lane of Tribble Gap Road. The Movement voluntarily dismissed the second issue. Appellant's br. at 2 n. 2.

order of the court.[5] Parties are bound by such representations in order to allow the court to efficiently manage its docket. *See United States v. First Nat'l Bank of Circle,* 652 F.2d 882, 886 (9th Cir.1981) ("Unless pretrial orders are honored and enforced, the objectives of the pretrial conference to simplify issues and avoid unnecessary proof ... will be jeopardized if not entirely nullified."). Accordingly, we turn to the single issue before us.

It is undisputed that the streets of the City of Cumming leading to the courthouse are quintessential public forums. Therefore, the City's eight to limit expressive activity on these streets is "sharply circumscribed." *Perry Education Assoc. v. Perry Local Educators' Assoc.,* 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). The City, however, may enforce reasonable restrictions on the time, place, and manner of the speech if they are "content neutral, are narrowly tailored to achieve a significant government interest, and leave open ample alternative channels of communication." *Id.*

The prior panel of this court held that the Saturday morning ban on parades is content neutral. We are bound

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[5] The pretrial order stated that "[P]laintiff and defendant also agree that the remaining issue between the parties is the constitutionality of the Cumming ordinance, as set forth in the remand from the Eleventh Circuit." R. 3-74 at 1. As previously noted, this court remanded for the limited purpose of allowing the City to submit evidence on whether its ordinance was narrowly tailored to achieve a significant government interest and whether ample alternative means of communication existed. *Nationalist Movement,* 913 F.2d at 889-90.

by the law of the case.[6] Thus, we need only decide the three remaining issues: 1) whether the City has advanced evidence that the ordinance furthers a significant government interest, 2) whether the ordinance is narrowly tailored to achieve these objectives, and 3) whether the ordinance leaves open alternative means of expression.

The City has argued that it has a significant interest in controlling traffic and ensuring the convenience and safety of its citizens. The City submitted affidavits attesting to increased traffic on Saturday mornings and the need for local citizens to have access to doctors' offices, a drug store and other businesses. It is well established that these are significant governmental interests. *Cox v. State of Louisiana*, 379 U.S. 536, 553-55, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement."); *see also Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 506-09, 101 S.Ct. 2882, 2892-93, 69 L.Ed.2d 800 (1981) (holding that traffic safety is a substantial government goal). Accordingly, the City has met the first of the requirements for a reasonable time, place and manner restriction.

In evaluating whether the ordinance is narrowly tailored to achieve these goals, we are mindful of the standards set forth by the Supreme Court on this issue. In *Ward v. Rock Against Racism,* 491 U.S. 781, 799800, 109 S.Ct. 2746,

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[6] *See United States v. Robinson,* 690 F.2d 869, 872 (11th Cir.1982) ("Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case.").

2758, 105 L.Ed.2d 661 (1989), the Court stated that the requirement of narrow tailoring is satisfied if "'the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985)). The Court further noted that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech restrictive alternative." *Ward Rock,* 491 U.S. at 800, 109 S.Ct. at 2758. The Court cautioned, however, that the restriction may not burden significantly more speech than necessary to achieve the government's goals. *Id.*

The City has submitted affidavits showing that the ordinance is narrowly drawn to achieve its aims. The evidence in the record establishes that Saturday morning is a particularly congested time of the day in the City of Cumming because of traffic leading to Atlanta and to the Georgia mountains.[7] In addition, local residents from outside of the

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[7] This case is distinguishable from *Beckerman v. City of Tupelo,* 664 F.2d 502, 513 (5th Cir. Unit A 1981), which is not binding in this circuit. The plaintiffs in *Beckerman* challenged an ordinance which prohibited parades in the downtown area after 6 p.m. and provided standards for the conduct of marchers. School groups and government agencies were excluded from the marching standards. The court held that the time restrictions were overbroad because the City claimed that they had a security interest in preventing night parades, but daylight extended past 6 p.m. in Tupelo for significant portions of the year. Here, in contrast, the City asserted an interest in traffic control and accordingly limited parades during the time of the day with the heaviest traffic. The *Beckerman* court also struck down the exclu-

City use Saturday mornings to attend doctor's appointments and to conduct business. The City has presented sufficient evidence to establish that its desire to control traffic and to promote safety would be achieved less effectively in the absence of the regulation. Moreover, the ban on parades in the morning is not substantially broader than needed to further the City's purposes because the ordinance prohibits parades during those hours when the City has determined that traffic is heaviest. See *Metromedia,* 453 U.S. at 508-09, 101 S.Ct. at 2893 (deferring to local authorities with respect to legislative judgements as to traffic matters).

Finally, we address whether ample alternative channels of communication are available. The ordinance does not prohibit leafletting, distributing pamphlets, or marching on the streets not adjacent to, or leading directly to the courthouse grounds. Moreover, parades and assemblies are allowed on Saturday afternoons. The Movement has many alternative means to communicate its message.

III.

Accordingly, we hold that the ban on Saturday morning parades is a reasonable time, place and manner restriction and AFFIRM the decision of the district court upholding the constitutionality of the City of Cumming's ordinance.

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sion of school and government groups from the regulations as violative of equal protection. As previously noted, appellant has waived an equal protection argument by failing to raise this issue in its first appeal and expressly agreeing to limit the issue in this case to the reasonableness of the Saturday morning ban.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8870

D. C. Docket No. 2:89-cv-06

THE NATIONALIST MOVEMENT,
a Mississippi non-profit corporation
incorporated in Georgia,

Plaintiff-Appellant

versus

THE CITY OF CUMMING, GEORGIA,

Defendant-Appellee

FORSYTH COUNTY, GEORGIA,
FORSYTH COUNTY BOARD OF EDUCATION,

Defendants

Appeal from the United States District Court
for the Northern District of Georgia

Before KRAVITCH and BIRCH, Circuit Judges, and SCHWARZER*, Senior District Judge.

Appendix 12

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable William W. Schwarzer, Senior U.S. District Judge for the Northern District of California, sitting by designation.

Entered: August 28, 1996
For the Court: Miguel J. Cortez, Clerk

By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 9/30/96

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

THE NATIONALIST MOVEMENT

VERSUS CIVIL NO. 2:89-CV-6-WCO

CITY OF CUMMING, GEORGIA

ORDER

The captioned case is before the court for further consideration, pursuant to the remand of the Eleventh Circuit Court of Appeals. The sole remaining issue, set forth in detail below, concerns the constitutionality, specifically in terms of the First Amendment, of defendant's ordinance regulating the conduct of parades at certain times on Saturday mornings.

FACTS

The events precipitating this lawsuit occurred over six years ago. Plaintiff sought a parade permit to march down Tribble Gap Road in Cumming, Georgia, on January 21, 1989. The parade, scheduled to commence at 1:00 pm, was to conclude at the Forsyth County Courthouse grounds. The permit as sought was granted by defendants. Thereafter, plaintiff endeavored to change the starting time of the parade to 9:00 am. Defendant denied this request in

accordance with the ordinance that proscribes Saturday parades prior to 1: 00 pm. The ordinance states, in pertinent part:

> [N]o private organization or group of private persons may use the roads immediately adjacent to those roads which lead directly to the Forsyth County Courthouse grounds for private purposes of holding a parade, assembly, demonstration, or other similar activity on any non-holiday weekday prior to 8:00 am or after 5:00 pm or **on any Saturday, Sunday, or public holidays prior to 1:00 pm** or after 5:00 pm. These prohibitions are not in any way intended to restrict the scheduling of the annual 4th of July Thomas-Mashburn Steam Engine Parade which, according to tradition, occurs during the morning hours in conjunction with the 4th of July celebration.

Ordinance By the Mayor and Council of the City of Cumming, Georgia at 6(g) (as amended) (emphasis added). Defendant made no attempt to curtail plaintiff's proposed parade, other than to deny the requested change in time in accordance with the highlighted portion of the ordinance reproduced verbatim above.

On January 19, 1989, plaintiff filed suit in this court seeking a temporary restraining order, temporary and permanent injunctions, compensatory damages, punitive damages, and attorney's fees against defendant, as well as other

defendants who are no longer parties to this suit.[1] The court denied the request for a temporary restraining order and dismissed the suit on its merits.[2] Plaintiff appealed this court's ruling to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit remanded the case for an adjudication of defendant's ordinance set forth above. The Nationalist Movement v. City of Cumming, 913 F.2d 885 (llth Cir.1990).[3] Both sides have submitted memoranda of law and affidavits in support of their respective positions.

At this juncture, therefore, the only issue before the court is the constitutionality of defendant's ordinance, limiting the available times for Saturday parades. Notwithstanding a number of attempts on previous occasions to clearly define the issue(s) before the court, there remains some confusion as to whether the ordinance in its entirety, or only that portion regarding Saturday morning parades, is before the court. Plaintiff's brief addresses all aspects of the ordinance, whereas defendant directs its attention to that clause of the ordinance which prohibits parades on Saturday mornings. This court has previously stated that

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[1] The dismissed defendants are Forsyth County and the Forsyth County Board of Education.

[2] Furthermore, the court found that plaintiff's counsel sought to defraud the court, and thus revoked plaintiff' s counsel's *pro hac vice* status. *See* Order dated April 25, 1989.

[3] The portion of the lawsuit which proceeded to the United States Supreme Court concerned the constitutionality of a parade fee imposed by the county, and did not directly involve defendant herein. See Forsyth County v. The Nationalist Movement, ___ U.S. ___, 112 S.Ct. 2395 (1992).

the case is "before the court on remand from the Eleventh Circuit on two issues: (1) may defendant . . . enforce a ban on parades on Saturday mornings against First Amendment objections, and (2) may the defendant restrict roadway used for parades to a single lane?" Order Dated October 5, 1993, at 1. Plaintiff has voluntarily "non-suited" the second issue. Plaintiff's Memorandum of Law, at 5 n.7. At a teleconference over one year after the entry of the aforementioned order, the parties agreed to the scope of the remaining issues. In an order memorializing that teleconference, the court stated that "[p]laintiff and defendant also agreed that the remaining issue between the parties is the constitutionality of the Cumming ordinance, as set forth in the remand from the Eleventh Circuit." Order Dated October 26, 1994, at 1. On February 22, 1995, the court conducted a third conference. At the February 22 conference, held in chambers, the same dispute between the parties as to the scope of the surviving issues was evident. The court definitively and conclusively ruled on this issue in an order issued following the February 22 conference. That order stated, in relevant part:

> This matter was addressed at an earlier conference on October 26, 1994. At the October 26 conference the following exchange occurred:
>
> THE COURT: What's your view as to what the issues are, Mr. Smith?
>
> MR. SMITH: Well, Your Honor, on your order of October 4, 1993, you indicated, after having a conference where Mr. Barrett was present, that the issue remaining was the constitutionality of the Sat-

urday morning ban on parades, so it is my position that is the only issue remaining.

MR. BARRETT: I think that's true, Judge.

THE COURT: You agree that's true?

MR. BARRETT: Yeah. I think that's basically it, yes, sir.

Transcript at 3 (Lines 7-18) (emphasis added). As indicated by the above exchange, the sole issue remaining is the constitutionality of the Saturday morning ban on parades. This is the only issue before the court.

Order Dated February 28, 1995, at 4-5 (emphasis in original). The court went on to state, unequivocally, that "[e]vidence and argument pertaining to any other issue will be deemed extraneous and therefore not considered by the court." *Id.* at 5.

Based on the foregoing, the court will concentrate its legal

analysis exclusively on the constitutionality of the restriction on Saturday morning parades. That said, most of the legal conclusions reached below would be equally applicable to the ordinance in its entirety.

LEGAL ANALYSIS

It has long been established that the freedom of expres-

sion guaranteed by the First Amendment is not an absolute right. Thus, the government, consistent with the First Amendment, may place reasonable time, place, and manner restrictions on the freedom of speech. This is particularly true in the context of regulating the public environment or common areas.

> If a municipality has the authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied the authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets.

Cox v. New Hampshire, 312 U.S. 569, 576 (1941). That said, the ability of a government to regulate in this area is severely constricted by the mandates of the First Amendment. As a general proposition, "[a] major criterion for a valid time, place, and manner restriction is that the restriction 'may not be based upon either the content or subject matter of speech.'" Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (*quoting* Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 536 (1980)). If a state elects to "enforce a content-based exclusion[,] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 45 (1983) (*citing* Carey v. Brown, 447 U.S. 455, 461 (1980)). The legal test for a content-neutral restriction, while still substantial, is somewhat less onerous than that governing an ordinance which addresses a particular message.

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have been immemorially held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens ' and discussing public questions." . . . In these quintessential public forums, the government may not prohibit all communicative activity. . . . **The State may . . . enforce regulations of the time, place, and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.**

Perry, *supra*, at 45 (citations omitted) (emphasis added). As set forth in Perry, the court must analyze the ordinance in terms of four criteria: (1) Is the ordinance content-neutral; (2) Is the ordinance narrowly tailored; (3) Does the ordinance serve a significant government interest; and, (4) Does the ordinance leave open ample alternative channels of communication? With that background, the court can now proceed to evaluate the merits of the Saturday morning ban on parades in the City of Cumming, Georgia.

The first inquiry is whether defendant's ordinance restricting the ability of one to orchestrate a parade on Saturday mornings is content-neutral. Certainly, on its face, the language suggests neutrality. *See* ordinance By the Mayor and Council of the City of Cumming, Georgia at § 6(g) (as

amended), *supra*. "The principle inquiry in determining content neutrality, in speech cases generally, and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message in conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted). Further, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Defendant's ordinance passes muster under this analysis. Plaintiff offers no evidence in support of its conclusory allegation that the ordinance discriminates against a certain message. Plaintiff's attempt to mislead the court by incompletely representing the holding of Smith v. Arkansas State Highway Employees, 441 U.S. 463 (1978), is also of no avail.[4] in addition, plaintiff's effort to impugn the content-neutrality of this ordinance has previously been rejected by the Eleventh Circuit. See The Nationalist Movement v. City of Cumming, 913 F.2d 885, 888 (11th Cir. 1990) (The claim of a content-based ordinance "is refuted by the simple fact that the City granted the Movement's earlier request to conduct a parade in the afternoon.") . Lastly, plaintiff's contention that the allowance of a Fourth of July parade on Saturday mornings is evidence of discrimination based on the content of speech,

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[4] As a point of fact, the Smith case simply sets forth the position espoused by defendants. It states: "The government is prohibited from infringing upon [First Amendment] guarantees either by a general prohibition against certain forms of advocacy..... or by imposing sanctions for the expression of particular views it opposes." Smith, *supra*, at 464 (emphasis added) (citations omitted). The court's finding in the case *sub judice* on the issue of content neutrality is entirely consistent with this proposition.

is without merit. That parade is distinguishable in that it falls on a national holiday, which means that there is less traffic and businesses are closed. The court finds, as a matter of law, that the ordinance at issue is content-neutral.

The second question is whether defendant has advanced a "significant government interest" in support of the time, place, and manner regulation. The primary interests advanced by defendant are those of controlling traffic flow on Saturday mornings, and the furtherance of public safety. These have long been recognized as a legitimate bases for reasonable governmental infringements on expression. *See, e.g.,* Cox v. New Hampshire, 312 U.S. 569 (1941). "The authority of a municipality to impose restrictions in order to assure the safety and convenience of the people in the use of public highways has never been recognized as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." *Id.* at 574. Thus, "[w]here a restriction of the use of highways . . . is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection." *Id.* In this case defendant has offered ample evidence, by way of the affidavit of Gerald Blackburn, defendant's city manager and a long-term Cumming resident, in support of the contention that there is a substantial interest in controlling traffic flow on Saturday mornings. Further, this rationale is set forth unequivocally in the ordinance's preamble.[5]

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[5] "WHEREAS, it is in the public interest that such uses not interfere unduly with the rights of citizens not participating therein nor endanger the public safety nor obstruct the orderly flow of traffic...." Ordinance By the

The significance of this was noted by the Eleventh Circuit. "The recitals of findings and purposes contained in an ordinance's preamble can serve to identify governmental interests for the purpose of this analysis..... Indeed, such recitals may well be entitled to greater weight in identification of governmental interests than post hoc articulations by counsel in judicial proceedings." Nationalist Movement, 913 F.2d at 889 n.3 (*citing* Frisby v. Schultz, 487 U.S. 474, 477 (1988)). A second significant interest proffered by defendant, and unrefuted with any credible evidence by plaintiff, is that the Saturday morning regulation promotes the conduct of normal business activity, in that traffic within and around the central business district is not impeded. The "[United States Supreme] Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." NAACP v. Clairborne Hardware Co., 458 U.S. 886, 912 (1982). Reasonably limiting the times and places of parades in business-intensive areas is an example of such a permissible economic regulation.

The third inquiry under the time, place, and manner analysis, requires the court to ascertain whether the challenged restriction is narrowly tailored to serve the asserted governmental interests. In this case, the court finds, as a matter of law, that the Saturday morning ban on parades meets this test. First, and most obviously, plaintiff or any other group is free to conduct a parade on Saturday after-

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Mayor and Council of the City of Cumming, Georgia at § 6(g) (as amended) (preamble).

noon. In fact, plaintiff was granted a permit for this very purpose. Defendant has sought to proscribe parades during the time period which the city government has deemed to be peak hours of traffic and public use. As set forth in Mr. Blackburn's affidavit, this is a popular time for residents to shop in the business district, as well as a time in which a significant amount of "pass-through" traffic is in the area. This was considered necessary based on past experiences with parades in the geographic vicinity of the courthouse. Once again, plaintiff, relying on conclusory statements, rhetorical questions, and lacking in any credible evidence, is unable to defeat this prong of the analytical framework. The ordinance may stand, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest. . . ." Ward, *supra*, at 800. While the ordinance must be narrowly-tailored, "it need not be the least restrictive or least intrusive means" of meeting the stated purpose. *Id.* at 798. Defendant's ordinance comports with this standard.

The fourth and final prong of the applicable First Amendment analysis requires defendant to demonstrate that ample alternative channels of communication exist, after accounting for the ordinance's proscriptions. Defendant herein clearly meets this standard. First, on its face the ordinance provides for the permissive conduct of parades on Saturday afternoons.[6] Second, and of equal impor-

[6] Other times of the week are also available for the staging of a parade, but, as noted above, this order is concerned only with the Saturday morning ban. Thus, the availability of alternate times on Saturdays is the critical question.

tance, other forms of communication are not in any way restricted during the hours of 9:00 am to 1: 00 pm on Saturday. Thus, plaintiff could distribute leaflets outside the central business district or vicinity of the courthouse, or even conduct a parade in a different section of town. Such a scheme can easily withstand constitutional scrutiny.

CONCLUSION

After careful consideration of both law and fact, the court finds that defendant's ordinance which prohibits Saturday morning parades is constitutional. The court is mindful of the admonition that "[p]ublic-issue picketing . . . has always rested on the highest rung of the hierarchy of First Amendment values," Carey v. Brown, 447 U.S. 455, 466-67 (1980), and is confident that the regulatory scheme enacted by the City of Cumming is faithful to this fundamental constitutional principle. In view of the foregoing, judgment shall enter for the defendant, City of Cumming, Georgia.

IT IS SO ORDERED this 29th day of June, 1995.

WILLIAM C. O'KELLEY
United States District Judge

Appendix 25

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

THE NATIONALIST MOVEMENT
Plaintiff

CIVIL ACTION NO.:
2:89-cv-06-WCO

vs

CITY OF CUMMING, GEORGIA
Defendant

JUDGMENT

This action having come before the court, Honorable William C. O'Kelley, United States District Judge, for further consideration pursuant to the remand of the Eleventh Circuit Court of Appeals, it is

ORDERED AND ADJUDGED that the court finds that defendant's ordinance which prohibits Saturday monring [sic] parades is constitutional.

Dated at Gainesville, Georgia, this 30th day of June, 1995.

LUTHER D. THOMAS, CLERK
By: Johnnie Sanders
Resident Deputy Clerk

Filed and entered in Clerk's
Office this 30th day of June, 1995.

LUTHER D. THOMAS, CLERK

By: J. Sanders
Resident Deputy Clerk